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METRO DETROIT

High court muddies wetlands rules

2 Michigan developers get new chance

June 20, 2006

BY DAVID ASHENFELTER
FREE PRESS STAFF WRITER

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The U.S. Supreme Court issued a major ruling Monday in a Michigan wetlands case that raised more questions than it answered and prompted immediate calls from advocates on both sides for Congress to make rules.

In the 5-4 decision, the high court found that the U.S. Army Corps of Engineers may have misinterpreted the 1972 federal Clean Water Act by refusing to let Michigan businessmen develop wetlands they owned. John Rapanos wanted to build a shopping center in Midland, and Keith Carabell wanted to build condos in Macomb County's Chesterfield Township.

The court sent both cases back to U.S. District Court in Detroit for hearings to decide whether there is a substantial connection between the wetlands and the waters they feed. But the justices didn't provide guidance on how close a wetland should be to a navigable waterway to merit federal protection.

"The court rejected the idea that there are no limits on the federal



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John Rapanos looks at land in Midland he hoped to develop. After filling in wetlands, he got 18 months of probation and was fined \$185,000. The Supreme Court sent his case back to be reconsidered by a lower court. (TOM PIDGEON/2004 New York Times photo)

MICHIGAN IN SPOTLIGHT

For the second time in a week, the U.S. Supreme Court has waded into a Michigan legal battle.

In addition to Monday's wetlands decision, the high court ruled Thursday in a Detroit drug case that evidence seized with a search warrant can be used in court even when police fail to announce themselves or don't give residents enough time to answer the door.

Although the justices left intact the so-called knock-and-announce rule, they didn't say how much time police must give homeowners to answer the door.

government's regulatory authority under the Clean Water Act," said Rapanos' lawyer, Reed Hopper of the Sacramento, Calif.-based Pacific Legal Foundation. "It is not the role of the federal government to micromanage every pond, puddle and ditch in our country."

The case, the first environmental dispute to be decided by the court under President George W. Bush's new chief justice, John Roberts, was closely watched by property rights advocates and environmentalists.

Environmental groups said Monday's decision threatens the nation's waters. Property rights advocates said the ruling brings reason to the government's authority over private property.

Hopper said he hopes the lower court will rule in Rapanos' favor.

Carabell's lawyer, Timothy Stoepker of Detroit, predicted Carabell would win his fight.

Said Carabell, 79: "I hope I'm still alive when they decide this thing."

Rapanos couldn't be reached.

The justices submitted five opinions spanning 100 pages in which the court rejected the federal government's efforts to control all wetlands in the country.

The court's four conservatives -- Antonin Scalia, Clarence Thomas, Samuel Alito Jr. and Roberts -- voted to limit the scope of wetlands under federal oversight to those connected directly to navigable waterways.

The court's most liberal members -- John Stevens, Stephen Breyer, Ruth Bader Ginsburg and David Souter -- said the conservatives were reversing three decades of federal regulation.

Justice Anthony Kennedy, who sided with the conservatives in ruling that regulators may have overstepped their authority, said wetlands must "significantly affect the chemical, physical and biological integrity" of nearby navigable waterways to be regulated by the federal government.

Because of the 4-4 split, court observers said his decision becomes the law

David Ashenfelter

COURT DEVELOPMENTS

On Monday, the justices also:

Ruled 6-3 that California parolees can be searched without cause as a condition of their release from prison and as part of state efforts to deal with repeat offenders.

Ruled 9-0 and 8-1 in two cases that prosecutors can use victims' statements to 911 operators or police during emergencies, even if the victims don't testify in court.

Agreed to hear a second Bush administration appeal that seeks to reinstate a federal ban on what opponents call partial-birth abortion.

Refused to block part of the Medicare prescription drug program, a defeat for states that say they may get stuck with the bills.

Rejected an appeal from Holocaust survivors who say they've been cheated out of a fair share of a \$1.25-billion settlement over looted assets.

Ordered West Virginia's highest court to consider whether a man's rights were violated when potential evidence in his case was suppressed.

Associated Press

of the land.

But absent guidance from Congress, courts must decide on a case-by-case basis which wetlands should be regulated.

Wetlands are important because they filter pollution from water before it reaches waterways. They also store water to reduce flooding and support nurseries for fish and wildlife. More than half of the nation's wetlands have been drained or filled for development. About 100 million acres remain.

Rapanos ran afoul of regulators in the mid-1990s when he filled three wetlands covering 54 acres near Midland without a permit. He hoped to build a motel and shopping center. The land flows into creeks that feed into the Kawkawlin River, which drains to Saginaw Bay. The land is 20 miles from the bay.

The federal government filed criminal and civil complaints in federal court. He eventually was sentenced to 18 months of probation and fined \$185,000, although federal prosecutors have appealed, seeking prison time.

Carabell wanted to build 112 condominiums on 16 acres next to a drainage ditch near I-94 and 23 Mile Road. The wetland is divided by a berm from a ditch that flows into Lake St. Clair about 1 mile away.

He obtained a permit from a state judge, but the Corps of Engineers refused to give its approval, prompting Carabell to sue in federal court.

Both cases went to the U.S. 6th Circuit Court of Appeals, which upheld lower courts.

The decision is likely to have no immediate impact on Michigan, where wetlands are regulated by the state.

There was no immediate comment from the Corps of Engineers.

A state Department of Environmental Quality spokesman said Monday that the agency would continue to contest the two Michigan developers.

*To read the decision go to <http://www.supremecourtus.gov/opinions/05pdf/04-1034.pdf>. Contact **DAVID ASHENFELTER** at 313-223-4490 or ashenf@freepress.com. The Associated Press contributed to this report.*

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